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In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,
Appellant.

vs.

J. A. KIRCHWEHM

Appeal From The Supreme Court of Ohio

PETITION FOR REHEARING OF APPEAL DISMISSED WITHOUT ORAL ARGUMENT

SIGMUND H. STEINBERG,
WILLIAM K. GARDNER,
Counsel for Appellant.
SAMUEL J. GOTTESFELD,
BLANC AND STEINBERG,
of Counsel for Appellant.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
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PETITION FOR REHEARING OF APPEAL.

(Dismissed Without Oral Argument)

To the Honorable, the Judges of the Supreme Court of the United States:

Petitioner, V. D. Payne, appellant herein, by his attorneys, Sigmund H. Steinberg and William K. Gardner, respectfully prays that your Honorable Court grant a rehearing in the above matter, for the following reasons:—

I.

The appeal is from a judgment of the Supreme Court of Ohio, dismissing plaintiff's action on the ground that it was already barred by limitation.

The Supreme Court of Ohio, in reaching that conclusion, *refused* to apply the *Ohio* statute of limitations, under which the action was *not* yet barred, but insisted on applying, and held itself compelled by the legislation of its own State to apply, the statute of limitations of the State of Florida, where the action arose.

Concededly the present action was not barred under the Florida statutes as those statutes are applied and given effect by the decisions of the Supreme Court of Florida.

Although the Supreme Court of Ohio rested its decision squarely upon the Florida statutes, it refused to give them that application and effect which they had in Florida by law and usage and under the Florida decisions, under all of which the action was *not* barred. Instead the forum gave the Florida statute an application and effect entirely foreign and contrary thereto, and held that the action *was* barred under the Florida statutes.

II.

Speaking generally, the question involved in this appeal, insofar as it touches the full faith and credit clause of the Federal Constitution is: Where the forum voluntarily, and under the compulsion of the legislation of its own State, insists that its own statute of limitation is inapplicable and that the action is controlled by the statute of limitation of the State where the action arose, is it not then required to give to the latter statute that same *full* faith and credit as is commanded by this Constitutional provision and by the decisions of this Court construing it?

Speaking more particularly, the question involved in this appeal, insofar as it touches the aforesaid Constitutional provision, may be said to be: Where the forum (Ohio), because of legislative compulsion, refuses to apply its own statute of limitations, under which the action is not barred, and insists upon applying the statute of limitations of the State where the action arose (Florida), is it not then required to give to the statute of limitations of that State (Florida) the same application and effect which that statute has in the State of its enactment by law and usage, and under the decisions of the Supreme Court of that State, under which the action is not barred?

III.

Your Honorable Court, on October 11, 1943, entered the following order dismissing the appeal:—

> "*Per curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) Alaska Packers Associa-

tion v. Commission, 294 U.S. 532, 547; Pacific Insurance Co. v. Commission, 306 U.S. 493, 502; (2) Michigan Insurance Bank v. Eldred, 130 U.S. 693, 696; Platt v. Wilmot, 193 U.S. 602, 610; Guaranty Trust Co. v. U.S., 304 U.S. 126, 136."

Presumably the appeal was dismissed by your Honorable Court on the theory, occasionally expressed by your decisions, that a federal question is not substantial if "it may be put aside on mere citation of earlier decisions" (*Alton R. R. v. Illinois Com. Comm.*, 305 U.S. 548), since none of the decisions cited in the *per curiam* opinion in any way discuss what constitutes a "substantial federal question" or in any way militate against the decisions which are referred to and discussed in appellant's brief opposing motion to dismiss the appeal (pages 5 to 7 inclusive), which cases do define that term.

It is obvious that appellant did not make his position clear in the briefs which he heretofore filed, since the cases cited in the *per curiam* opinion do not in any way, even in the remotest degree, touch that aspect of the full faith and credit clause which appellant claims to have been violated by the decisions, and on the other hand all of them refer entirely, as we shall hereinafter demonstrate, to an aspect of the full faith and credit clause which is in no way involved in this appeal. We should have pointed out in our original briefs, as we shall now do briefly, that the full faith and credit clause of the Federal Constitution has two distinct objects and purposes in view, only one of which is involved in this appeal, in which event we are quite certain that this Court would not have dismissed the appeal on the basis of the decisions cited in the *per curiam* opinion which in no way refer to that particular aspect of this constitutional provision.

IV.

The full faith and credit clause of the Federal Constitution has a dual purpose and aspect:

In its *first* aspect this clause operates as a restraint on the general sovereignty of the state, and compels it, to a limited degree to subordinate its own statute and to apply the conflicting law of another state. Questions arise under this aspect of that provision where the forum insists on applying its own law and refuses to subordinate it in favor of the conflicting statute of another state, and the question then involved is whether the case falls within the compulsory range given to this provision by the decisions of this Court. Needless to say that decisions under this aspect of that Constitutional provision are not and cannot be involved in the instant appeal, for the reason that the forum did *not* apply its *own* statute of limitations. In fact, it was the forum that refused to apply its own statute, although appellant was entirely satisfied that it should do so.

The *second* purpose and aspect of this clause of the Federal Constitution comes into play and operation when the first has been passed, and only when the forum has undertaken, as in the instant case, to apply the statutes of another state and to predicate its decision thereon. In that event, "this provision of the Constitution establishes a rule of evidence." *(Anglo-American Prov. Co. v. Davis Prov. Co.,* 191 U.S. 373, 374; *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 292); it prescribes "a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending action as to the faith and credit to be given by the Court to the public acts, records and judicial proceedings of a state other than that in which the Court is sitting" *(Minn. v. North Sec. Co.* 194 U.S. 48, 72).

This Court has specifically held that where the forum has undertaken to apply the laws of another state and complaint is made that the forum did not give such statute the proper effect "the question for decision [by this Court] is whether the action in this case of the Texas State Court [forum] in dismissing the suit denied to that judgment [or statute] the *full* faith and credit which the Constitution commands" *(Adams v. Saenger*, 303 U.S. 59, 60).

The requirements of the rule, under this aspect of the full faith and credit clause of the Federal Constitution, have been so clearly defined by the decisions of this Court that there is no room for doubt. The rule requires the forum, when it does apply the statute of a sister state, to give to that statute the same application and effect as it has in the state of its enactment, as it has under the decisions of the Supreme Court of that state; that is: the same effect as these laws have by law and usage at home *(Chicago and Alton R. R. v. Wiggins*, 119 U.S. 615 (1886); *Milwaukee County v. White*, 296 U.S. 268 (1935)); such effect as is given to such statutes of the sister state by the decisions of that state in construing and applying them *(John Hancock Ins. Co. v. Yates*, 299 U. S. 178 (1936); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Eastern B. & L. Assn. v. Ebaugh, supra; Milwaukee County v. White, supra).*

No decision of this Court has ever deviated from the principle above enunciated, as to the character and degree of faith and credit which the forum is required to give the statute of the sister state when the forum does undertake to apply it, regardless of the circumstances under which this forum applied it, so long as the forum did apply the statute of another state.

It is obvious that any question in this appeal which

involves the full faith and credit clause must fall under this second aspect of that Constitutional provision, and so viewed it becomes crystal clear that the decisions cited in the *per curiam* opinion of your Honorable Court dismissing the appeal in no manner or degree touch the latter question, the only question involved in this appeal concerning that Constitutional provision, and on the contrary each of them refers specifically and entirely to questions arising under the first aspect of this provision, which is not in any way involved in this appeal.

V.

The decision of **Guarantee Trust Co. v. United States, 304 U.S. 126, 136,** cited in the *per curiam* opinion aforesaid, merely holds "that the rule which exempts the United States and the States from the operation of statutes of limitations * * * does not extend to a foreign sovereign suing in a state or federal court", which question, obviously, is not involved in the present appeal.

In the case of **Michigan Ins. Bank v. Eldred,** 130 U.S. 693, 696, cited in the *per curiam* opinion aforesaid, this Court held that the forum was not required to subordinate its conflicting statute of limitations for that of the state where the action arose, because "the only Statute of limitations applicable to such an action [personal action] *are the statutes of the state where the action is brought and not those of the state where the action arose*" and that "Statutes of Limitations * * * were 'laws of several states' which must under the Judiciary Act of September 24, 1789 c 20, Sec. 34 'be regarded as rules of decisions in trials at common law in the Courts of the United States in cases where they apply.'" **Platt v.**

Wilma, 193 U. S. 602, 610, cited in the *per curiam* opinion is to the same effect.

In **Alaska Packers Assn. v. The Commission** 294 U.S. 542, 547, and likewise in **Pacific Ins. Co. v. The Commission**, 306 U.S. 493, 502, both cited in the *per curiam* opinion, the State of California insisted on applying its own Workmen's Compensation Act and refused to apply that of another state (in one instance Alaska and in the other instance Massachusetts). Your Honorable Court there stated the question involved to be as follows:

> "The subject of our inquiry is therefore whether the full faith and credit clause requires the Statute of California to give effect to the Alaska Statute rather than its own";

and your Honorable Court concluded that the full faith and credit clause did not lay down "a rigid and literal" rule which required the forum at all times and regardless of circumstances to subordinate its own conflicting statute for that of another state, and further concluded that "it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another" (p. 547).

It is obvious that the four decisions cited in the *per curiam* opinion and last referred to, each dealt only with the duty of the forum, under that Constitutional provision, to subordinate its conflicting statute to that of a sister state, and held that none of these cases fell within that range of the provision which *compelled* subordination, and upheld the right of the forum to apply its own statute. Not one of these decisions deals with the question of the duty of the forum, when it has subordinated its *own* statute and when it has applied the statute of another state, to give to that latter statute the character

and degree of faith and credit required by that Constitutional provision and by the decisions of this Court construing it.

VI.

Appellant also should have stated in his Statement as to Jurisdiction and in his brief Opposing Motion to Dismiss that the decision of the Ohio Supreme Court in the instant case stands out as *a lone minority.* The *identical* question, arising under similar borrowing statutes, has been decided *uniformly* by both state and federal courts *contra* the instant decision.

The principle that applies to a foreign statute of limitations, containing a tolling by absence provision, is clearly stated in 37 *Corpus Juris,* p. 736, as follows:

> "In cases where it is sought to apply the statute of limitations of a foreign jurisdiction *the Court of the forum will apply the statute as a whole and deduct from the time of its running the period of absence from the State where the cause of action accrued* if that statute excluded such period."
>
> "In a case where the foreign statute of limitations is controlling, its construction by the Courts of the foreign jurisdiction *must* be accepted." (Italics ours)

This was expressly so held in the following cases:

Federal:

Martin v. Wilson, 120 Fed. 202, 206 (C. C. A. 7th);
Irving Nat'l Bank v. Law, 10 F. (2d) 721 (C. C. A. 2nd);*

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* Reversing itself (9 F. (2d) 536), upon having called to its attention decisions by the Court of Appeals of New York construing its statute. This aptly illustrates the conflict that will result among the federal courts if the Ohio decision in the instant case is not reversed.

McGrath v. Helena Rubenstein, Inc., 29 F. Supp. 822 (S. D. N. Y. 1939).

New York:

Hanna v. Stedman, 230 N. Y. 326, 130 N. E. 566;

Isenberg v. Ranier, 145 App. Div. 256, 130 N. Y. S. 27;

Mishawaka Woolen Co. v. Phillips, 156 N. Y. S. 778.

Minnesota:

Casey v. American Bridge Co., 116 Minn. 461, 134 S. W. 111.

Massachusetts:

John v. John, 307 Mass. 514, 30 N. E. (2d) 542.

Missouri:

Daniels v. Gallagher, 189 S. W. 644 (Mo. 1916).

Kansas:

Timmonds v. Messner, 109 Kan. 518, 200 P. 270.

Alabama:

Helton v. Turner, 228 Ala. 403, 153 So. 866, 868.

West Virginia:

Manufacturer's Trust Co. v Johnson, 115 W. Va. 607, 177 S. E. 448.

Wyoming:

Bonfield v. Price, 1 Wyo. 223.

Washington:

McElroy v. Gabes, 64 Wash. 249, 116 P. 845; 69 Wash. 669, 124 P. 1127.

Colorado:

Simon v. Wilner, 97 Colo. 178, 47 P. (2d) 406.

Oklahoma:

Fidelity & Deposit Co. v. Sheahan, 37 Okla. 702, 133 P. 228.

Other decisions *uniformly* have held that (aside from the tolling by absence provision of the foreign statute), where the forum, pursuant to its comity statute, applies the shorter limitation statute of the state where the cause of action arose, the forum must give it the *same* construction as given by the courts of the foreign jurisdiction, so that the action would *only* be barred in the forum if it would have been barred if commenced in the state in which the cause of action accrued:

11 *American Jurisprudence*, Sec. 197, p. 514.

New York:

Isenberg v. Ranier, supra;
Hanna v. Stedman, supra;
Klotz v. Angle, 220 N. Y. 347, 116 N. E. 24;
Dalyrymple v. Schwartz, 177 App. Div. 650, 164 N. Y. S. 496;
Whiting v. Miller, 188 App. Div. 825, 176 N. Y. S. 639.

Pennsylvania:

Mister v. Burkholder, 56 Pa. Super. 517.

Illinois:

Speich v. Atchison, etc. Ry., 178 Ill. App. 266.

Missouri:

Wojtylak v. Kansas etc. Co., 188 Mo. 260, 87 S. W. 506;
Christner v. Chicago etc. Co., 226 Mo. A. 220, 64 S. W. (2d) 752.

Federal:

Hilliard v. Pennsylvania R. R., 73 F. (2d) 473, (C. C. A. 6th 1934) *
B. & O. Ry. v. Reed, 223 Fed. 689 (C. C. A. 6th 1915) *

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* These cases involved the same Ohio comity statute, as in the instant case, and its predecessor. They were decided before the Ohio

In all of these cases the Court of last resort *actually* gave full faith and credit to the construction by the sister State of its statute of limitations without even considering it necessary to discuss the Constitutional question. Therefore, never before now was it necessary to invoke the aid of this Court. This case is one of first impression in this Court, and unless this Court settles the question by reversing the decision of the Ohio Supreme Court, the door will be left wide open for continued disregard of the full faith and credit clause of the Federal Constitution not only by Ohio, but also by any other courts that may see fit to follow it. The inevitable result will be confusion and conflict not only among the state courts, but also the federal courts. The question should be settled now when only one court is out of line with the well-established principles.

VII.

We therefore respectfully pray that your Honorable Court grant a rehearing of the appeal and on oral argument determine whether a forum which refuses to apply its own statute and insists on applying that of a sister state is exempt from the requirement of the full faith and credit clause and of the decisions of this Court that in doing so the forum give that statute the same application and effect which it has by law and usage in the state of its enactment.

And appellant will ever pray.

Respectfully submitted,

SIGMUND H. STEINBERG,

WILLIAM K. GARDNER,

Attorneys for Appellant.

Supreme Court decisions in the instant case and *Alropa v. Kirchwehm*, 138 Ohio S. 30, and were *contra* thereto.

We hereby certify that the aforegoing petition for rehearing is presented in good faith and not for delay.

SIGMUND H. STEINBERG,
WILLIAM K. GARDNER,
Attorneys for Appellant.